United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-1175
75-1176

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To be argued by
Robert J. Erickson

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE

v.

PAUL LABRIOLA AND DAWN SLOMKA,
APPELLANTS

UNITED STATES OF AMERICA,
APPELLEE

v.

RALPH PRINCIPIE,
APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS
FILED
AUG 12 1975

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FOR THE SECOND CIRCUIT

No. 75-1175

UNITED STATES OF AMERICA,
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ISSUES PRESENTED

1. Whether the government was required to amend an intercept order immediately upon ascertaining the identity of a previously unknown conspirator (Brief No. 75-1175, I; Brief No. 75-1176, II).

2. Whether intercepted communications related to the criminal activity designated in the order for electronic surveillance (Brief No. 75-1175, I).

3. Whether there was probable cause to name appellant Labriola as an intercept target (Brief No. 75-1175, II).

4. Whether the court below correctly suppressed only those oral communications which were improperly intercepted (Brief No. 75-1175, III).

5. Whether the failure to timely serve a post-termination inventory notice required suppression of authorized interceptions (Brief No. 75-1175, IV: Brief No. 1176, I).

STATUTES INVOLVED

18 U.S.C. 2517(5) provides:

> When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

In pertinent part, 18 U.S.C. 2518 provides:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication ... shall include the following information:
>
> * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted; * * * [N.Y. Crim. Proc. Law 700.20(2)(b) is substantially the same]
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> * * *
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify--

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates; *** [N.Y. Crim. Proc. Law 700.30(2),(3), and (4) substantially the same]

* * *

8(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of--

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

N.Y. Crim. Proc. Law 700.50(3) provides in pertinent part:

Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice.

N.Y. Crim. Proc. Law 700.65(4) provides:

> When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this article intercepts a communication which was not otherwise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such contents. The application for such amendments must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application.

STATEMENT OF FACTS

Following a bench trial in the United States District Court for the Eastern District of New York, appellants were convicted of having conspired to forge and utter United States savings bonds stolen from the mails in violation of 18 U.S.C. 371, 495, and 1708. In addition, appellant Labriola was convicted of having forged United States savings bonds, in violation of 18 U.S.C. 495. Appellants were sentenced as follows: Labriola, concurrent five-year terms of imprisonment on each count and a $5,000 fine; Principie, a four-year term of imprisonment; and Slomka, a suspended three-year term of imprisonment.

On June 19, 1972, Stanley Reinhardt, an underworld informer, contacted Assistant District Attorney Leonard Newman and told Newman that one Joseph Martino had offered to sell him a quantity of stolen United States postal bonds at 25 percent of their face value (Tr. 5-6). Martino had quoted Reinhardt the serial numbers on several of the bonds (Tr. 6) and an immediate investigation disclosed that the bonds were part of a group of bonds which were missing from a New York brokerage firm (Tr. 23). Martino had informed Reinhardt that he could be contacted at 377-9840, a number listed in the name of the 1234 Club; Martino told him to call that number and ask for "Paul" (Tr.6).[1/] The following day

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1/ Reinhardt, who had been acquainted with Martinto for some time, did not know why Martino had told him to ask for "Paul" when he telephoned the club (Tr. 28). Assistant District Attorney concluded that "Paul" was a code name, and that a conspirator who was present at the club would know that he could safely talk to an outside party when the code name was mentioned (Tr. 28, 43). During the operative period of the July 5 order authorizing wire interceptions over the telephone line of the 1234 (CONT'D)

(June 20) Reinhardt contacted Martino at that number and the conversation was recorded (Tr. 7).[2] In the conversation, Martino alluded to the existence of co-conspirators, telling Reinhardt that "everyone's waiting here [at the 1234 Club]" and that he received hourly reports from the people from whom he acquired the bonds (Tr. 26).[3]

Thereafter, Assistant District Attorney Newman prepared an application for electronic surveillance. On July 5, 1972, Justice Vetrano of the New York Supreme Court, Kings County, issued an order authorizing the interceptions of "the telephonic communications of Joe Martino, his co-conspirators, agents, and associates" for a period not to exceed thirty days (Order, July 5, 1972). The only confederate of Martino's identified in July 5 order was one "Ralph" (see, infra. at pp.13-13a).[4] Because the telephone was out of order for a period of time, the actual interception of conversations did not commence until July 11, 1972. The July 5 order was renewed and amended by succeeding

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1/ (CON'T) Club, the investigating officers concluded that the "Paul" identified in their monitorings was in fact appellant Paul Labriola. See, infra, at pp. 9-10.

2/ A second telephone call, not recorded, was also placed by Reinhardt to Martino.

3/ The 1234 Club operated almost like a private club. Located on a side street, very few people were observed entering or leaving the club, and detectives had been denied admittance to club. It was therefore determined that ordinary surveillance could not be maintained (Tr. 22, 39, 75, 96-97).

4/ Appellants do not dispute that the order and supporting application satisfied the statutory requirements of 18 U.S.C. 2510 et seq. Appellant Labriola does argue that this order should have been amended to identify him during its operative period. See Part. I,A. of our Argument, infra, at pp. 9-12.

orders issued on July 27, September 11, September 26, and October 28.

The July 27 order authorized a continuation of the wire interceptions over telephone line number 377-9840 as the 1234 Club. The order also identified appellant Paul Labriola as a target of the interception. In addition, the July 27 order authorized the interception of oral communications at the 1234 Club (Order, July 27, 1972). The September 11 order extended the previous order and was amended to designate the offense of possession of a dangerous drug (Order, September 11, 1972). Execution of this order was apparently unproductive as investigation revealed that sometime in early September appellants were compelled to move their base of operations to the Say Hi Club in Brooklyn because the 1234 Club was closed after having lost its liquor license (Tr.299). The September 26 order authorized the interception of pertinent conversations over a telephone line listed in the name of the Say Hi Club. Appellant Labriola was named as a target of the interception in this order as was appellant Principie, who had been identified in previous orders simply as "Ralph" (Order, September 26, 1972). The order of October 28 extended the September 26 order (Order, October 28, 1972). The authorization expired on November 26,1972. The evidence at trial consisted primarily of communications properly intercepted pursuant to these orders.[5/]

5/ Other crucial, indeed dispositive, evidence of the guilt of appellants Labriola and Slomka was introduced at trial. See Part IV of our Argument, infra at pp. 30-31 .

ARGUMENT

I

THE APPLICATIONS FOR AND ORDERS AUTHORIZING THE INTERCEPTION OF ORAL COMMUNICATIONS FULLY SATISFIED THE REQUIREMENTS OF THE FEDERAL AND NEW YORK STATUTES REGARDING THE IDENTIFICATION OF THE INDIVIDUAL, IF KNOWN, WHO IS COMMITTING THE OFFENSE AND WHOSE COMMUNICATIONS ARE TO BE INTERCEPTED

A. The Government was not required to immediately apply for an amendment of the July 5 order upon ascertaining the identity of appellant Labriola.

During the execution of the original July 5 order appellant Labriola's identity as one of the parties involved in the offenses cited in the order became known to the monitoring police officers. At that point, appellant urges, any interception of his conversations should have ceased until the District Attorney's Office obtained an amended order identifying him as one of the persons committing the offense and whose conversations were to be intercepted (Br. No. 75-1175 at 3-9).

The July 5 application and order identified the target of electronic monitoring as Joe Martino. The order also authorized the interception of communications over the target telephone of Martino's co-conspirators, agents, associates and "Ralph" (Order of July 5 and supporting application, Paragraph 23). Although law enforcement officers knew that appellant Labriola had a criminal record and was a frequent visitor at the 1234 Club (Tr. 41-42a, 109-112, 120-121), the officers had no specific knowledge of Labriola's complicity in the stolen securities conspiracy at the time the July 5 order was obtained (Tr. 34-35, 263). During the first two days on which interceptions were made,

July 11-12, a series of telephone calls to "Paul" were intercepted. The conversations were "cryptic" and of short duration (Tr. 131,136 262-263, 275, 282). At that time the monitoring officers did not know the identity of the "Paul" whose conversations had been intercepted (Tr. 98-99, 263, 270, 278, 284).[6] On July 14, officers intercepted a three-party conversation between "Paul," "Joe" (Martino), and "Ralph" and concluded that appellant Labriola was the "Paul" involved in the conspiracy under investigation (Tr. 98-99, 173-174). During the next 13 days officers continued to monitor those of Labriola's conversations which were pertinent to the conspiracy (Tr. 192-193, 195-196). On July 27, appellant Labriola was named as a target in the order renewing and amending [the July 5] eavesdropping warrant.

Appellant Labriola does not contend that he should have been identified in the July 5 order. Nor is there a basis for such an assertion. Thus, his contention that the interception of his conversations during the operative period of that order was unlawful must be rejected in view of the Supreme Court's decision in United States v. Kahn, 415 U.S. 143 (1974).

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[6] While it is clear that "Paul's" identity was unknown at this juncture, it is probable that the monitoring officers began to suspect Labriola might be "Paul" before July 14. On July 11, a conversation, in which "Paul" made an appointment with an unknown party, was recorded. Thereafter a man left the 1234 Club in appellant Labriola's automobile. He was followed to the designated place for the appointment (Tr. 176-177).

In Kahn, the wire interception order identified the two target telephones and the target of the monitoring, Irving Kahn. The Supreme Court rejected Mrs. Kahn's argument that her conversations were unlawfully intercepted pursuant to the order. The interception order was predicated upon probable cause to believe Irving Kahn and "others as yet unknown" were using the designated telephones to conduct an illegal gambling business, and the order authorized the interception over those telephones of the wire communications of Irving Kahn and "others as yet unknown." During the course of the monitoring, conversations of Kahn's wife, Minnie Kahn, were intercepted. These conversations, related to unlawful gambling, were between Mrs. Kahn and her husband and Mrs. Kahn and a third party.

As in Kahn, the order here was predicated upon probable cause to believe Martino and his confederates, unknown and thus unidentified [with the exception of "Ralph"] at the time the July 5 order was obtained, were engaged in a conspiracy to procure and sell stolen securities. As in Kahn, the order here authorized the interception over the target telephone of Martino's conversations as well as those of his confederates. Kahn clearly stands for the proposition that these circumstances are sufficient to authorize the interceptions which appellant Labriola contends should have been suppressed.[7/] Neither New York

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7/ Cf. United States v. Capra, 501 F.2d 267 (2nd Cir. 1974), cert. denied, U.S. , No. 74-659 (March 24, 1975). In Capra the order provided for the interception of "telephonic communications of Joseph Della Valle with co-conspirators, accomplices and agents" (emphasis added). 501 F.2d at 273.(CONT'D)

(N.Y. Crim. Pro. Law §700.05, et seq.) nor federal (18 U.S.C. §2510, et. seq.) statutes obligate the government to interrupt an electronic surveillance and obtain an amended order as soon as the identity of a conspirator who was listed as an unidentified party in the original order is ascertained. United States v. Kahn, supra. See, also, United States v. O'Neill, 497 F.2d 1020, 1023 (6th Cir. 1974) [interpreting N.Y. Crim. Pro. Law §700.65(4), and relying on People v. Gnozzo, 335 N.Y.S.2d 257 (1972), cert. denied sub. nom. Zorn v. New York, 410 U.S. 943 (1973)].

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7 / (CONT'D) Without amending the warrant, officers knowingly intercepted the conversations of one Della Cava, even though Della Valle was not a party to the conversations. Unlike the July 5 order which provided for the interception of the conversations of "Joe Martino, his co-conspirators, agents and associates," the order in Capra plainly limited the scope of authorized interceptions to conversations in which the named target was a party. Thus, this Court concluded that the interception of Della Cava's conversations was in effect warrantless.

B. The government was not required to identify appellant Principie more precisely in an application for an extension of the previous order once his full identity was ascertained

In its application for the initial interception order the government named, along with Martino and his unknown co-conspirators, a person identified as "Ralph" (July 3 Affidavit, paragraph 24). Although his precise identity was not known, "Ralph's" voice had been heard in the background during the June 20 conversation between the informer Reinhardt and Martino in which "Ralph" was heard to instruct Martino not to deliver a previously discussed stolen bond to Reinhardt until he received $4000 (July 3 Affidavit, Application in support of July 5 order, Affidavit of Assistant District Attorney Leonard Newman, dated July 3, Paragraph 15; Tr. 68-71). In August 1972, during the operative period of the July 27 order and extension, those involved in the investigation were able to conclude that the person previously identified in the orders as "Ralph" was appellant Ralph Principie (Tr. 217-220, 224-239, 323-324).[8/] In the renewed order of September 11, Principie was again identified only as "Ralph". However, in the two succeeding extentions of the interception order (dated September 26 and October 28) Principie was fully identified.

8/ Sometime in August, as the result of a "direct overhear," one of the investigating officers recognized the voice of Ralph Principie to be that of the "Ralph" whose conversations had been previously intercepted (Tr. 323-324). Moreover, on August 17, 1972, an unidentified individual in police custody apparently implicated appellant in the stolen securities scheme under investigation (Tr. 224-239). Prior to that time surveillance had established that an automobile registered to one Lillian Principie was on several occasions, the earliest being July 11, parked in the vicinity of the 1234 Club. On July 21, the (CON'T)

Appellant Principie contends that the failure to fully identify him in the applications and extension orders of July 27 and September 11 rendered unlawful the monitoring of his conversations throughout the operation periods of these orders (Br. 75-1176 at 14-16).

1. In our view, appellant urges an unwarrantedly expansive reading of the statutory language, which requires the identification in applications for interception orders of only one "person, if known, committing the offense and whose communications are to be intercepted" [18 U.S.C. 2518(1)(b)(iv); N.Y. Crim. Pro. Law §700.20(2)(b)(iv)][9/], not of any and all such persons. In this regard statutes also require the issuing judge to determine that there is probable cause to believe that "an individual"[10/] is committing a particular offense, that communications relevant to the offense will be obtained through electronic surveillance, and that the facilities from which or the place where communications are to be intercepted are being used in connection with commission of the offense or are

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8/ (CONT'D) monitoring revealed that "Paul" placed a telephone call from the target telephone to a Ralph at an outside number subscribed to by appellant Ralph Principie (Tr. 217-220). These latter factors apparently led the investigation to suspect Principie was involved. An observation report dated July 26 indicates he was under surveillance at that time (Tr. 247-248).

9/ The further requirement that the interception order specify the "identity of the persons, if known, whose communications are to be intercepted" [18 U.S.C. 2518(4)(a); N.Y. Crim. Pro. Law §700.30(2)] simply tracks the identification requirement for the application. United States v. Kahn, supra., 415 U.S. at 152.

10/ The language in N.Y. Crim. Pro. Law §700.15(2) is "a particularly described person."

"commonly used by [the identified] person." 18 U.S.C. 2518(3); N.Y. Crim. Pro. Law §700.15. The purpose of these provisions is "to link up specific person, specific offense, and specific places [or facility]." 2 U.S. Code Cong. & Adm. News 2191 (1968).

With these requirements satisfied, law enforcement officers may validly monitor the conversations concerning the particular criminal activity designated in the order which transpire the target telephone. The scheme of the monitoring statutes envisioned that many persons will possibly be heard; however, it was not the intention of the legislators to limit either interceptions or admissibility to only those incriminating communications to which the named target was a party. See, United States v. Kahn, 415 U.S. 143, 157 (1947). Instead, once the principal target is named, all conversations relating to the illegal activity on the target telephone may be overheard, including those of persons who were not known to be conspirators when the order was issued. United States v. Kahn, supra, 415 U.S. at 152-153. There is no sound reason for applying a different rule when one of the participants is a person, other than the principal target, who was known but not identified. Probable cause requirements are fully satisfied when adequate bases are shown in concluding that a particular offense is being committed and that communications concerning that offense will transpire at a particular place or over particular facilities. Indeed, the requirement that a particular individual, if known, be named in the application and order is not of constitutional dimension [United States v. Kahn, supra, 415 U.S. at 155, n. 15 and

157], but, rather, serves the specificity requirements of the statute--more particularly, the objective of establishing a nexus between person, offense and place or facility.[11/]

A requirement that an application for an order or an extension identify every person who the government has probable cause to believe will use the target telephone for illegal purposes poses serious practical difficulties. Even though an application may satisfy probable cause requirements and the specificity requirements of the statute, the failure to identify a participant where a court later concludes that identity was

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11/ A kindred issue is presented in United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), certiorari pending, No. 74-1486 (filed May, 1975). There, the Fourth Circuit held that every person whom the government has probable cause to believe will use the intercepted telephone for illegal purposes must be named in the application and order, and, further, that the failure to so name any such person warrants suppression as to him of his intercepted conversations. Accord, United States v. Moore, 513 F.2d 485, 492-494 (D.C.Civ. 1975), pet. for rehearing en banc pending; United States v. Donovan, 513 F.2d 337, 341 (6th Cir. 1975). Contra, United States v. Doolitte, 507 F.2d 1368, 1371-1372 (5th Cir. 1975), rehearing en banc granted April 2, 1975. We have filed a petition for a writ of certiorari in Bernstein and intend to file a petition in Donovan. While we believe these cases were incorrectly decided and are of course urging a general proposition contrary to those decisions, that proposition is not, for the reason stated (and discussed more fully infra, at pp. 18-21), dispositive here. The rationale of Bernstein and its progeny, are inapposite in the instant situation because the government did in fact amend the original application to include the names of both appellants Labriola and Principie.

required because probable cause existed as to that individual will result in suppression. While it may ordinarily be preferable for law enforcement officials to err on the side of caution, in this situation the suppression remedy would be applied because the judgment of the officials, that probable cause did not exist, was incorrect. Neither privacy interest nor the deterrent rationale of the exclusionary rule appear to be served by any such result.[12/] On the other hand, the identification of a party on probable cause grounds entails a similar risk, that is, that a reviewing court will conclude there was an insufficient basis for probable cause and the party's conversations should therefore be suppressed. Cf. United States v. Tortorello, 480 F.2d 764, 775-776 (2nd Cir. 1973), cert. denied, 414 U.S. 866 (1973). Indeed, appellant Principie's claim in part illustrates this problem. He insists that he should have been fully identified in the application for the July 27 extension order. Probable cause to believe Principie was the "Ralph" previously identified

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12/ Of course, in a case where the government omitted from the application, intentionally and with the intent to deceive the issuing judge, the identity of a person who was the real target, so that the government would not have to list prior interception history of that person, suppression might be appropriate. Cf. United States v. Bellosi, 501 F.2d 833 (D.C. Cr. 1974). In such a situation, the suppression remedy is appropriately applied to enhance, by virtue of the deterrent rationale, the privacy intrusts protected by the statute. In this case, however, it is clear from the eventual complete identification of appellant Principie in extension orders that the failure to fully identify him in the September 11 extension order embodied no improper purpose.

and monitored clearly existed by mid-August. There is at most a question, however, whether it existed earlier, prior to the application for the July 27 extension order.

In protecting the privacy rights of the users of the target telephone, Congress and the New York legislature provided a common safeguard--minimization of the interception of conversations not related to the offense under investigation. See, 18 U.S.C. 2518(5); N.Y. Crim. Pro. L. 700.30(7); United States v. Kahn, supra, 415 U.S. at 154.[13/] That is, the limitation is drawn in terms of the types of conversations to be intercepted, rather than the identity of the participants in the conversation. As such, no discernable policy goals of the legislatures would be promoted by requiring suppression of all conversations of a previously unknown conspirator. The plain language of the statutes requires only the identification of a single "person, if known, committing the offense and whose communications are

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13/ The record shows that surveilling officers minimized the interception of non-pertinent conversations. Assistant District Attorney Newman gave instructions to limit interceptions to conversations relating to the offenses under investigation; privileged calls were not to be recorded; interception of social calls was to terminate as soon as the social nature of the call was apparent (Tr. 31-32). These instructions were relayed to all surveilling officers (Tr. 92). In discussing the interception of appellant Labriola's conversations prior to the time he was named in the amended order, Detective Bonica testified that only "the criminal conversations were recorded in full" and the non-pertinent conversations "were cut short" (Tr. 192). The requirement of minimization demands no more. See, e.g., United States v. Capra, supra, 501 F.2d at 275-276, and cases cited therein.

to be intercepted."[14] This fully satisfied the specificity requirement of the statutes without compromising the privacy interests of persons other than the named target, as these interests are protected by the probable cause requirements in regard to the designated offense or offenses and the requirements of minimization. Thus, neither the statutory language nor considerations of policy support the expansive statutory interpretation appellant urges.

2. Even assuming, arguendo, that the statutes require the identification in interception orders of those individuals who the government has probable cause to believe will use the target telephone for illegal purposes, appellant Principie was so identified.

The order of July 5 authorized the interception of pertinent telephone conversations of Martino and his confederates, expressly including "Ralph".[15] "Ralph" was subsequently identified in each of the orders and was fully identified as Ralph Principie

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14/ Clearly, Congress and the New York Legislature could have specified "person or persons" had they intended the interpretation urged by appellant.

15/ The order incorporated by reference Paragraphs 23 and 24 of the application. Paragraph 24 specifies that the conversations sought to be intercepted are those of Martino, his confederates and "Ralph." The basis for probable cause to believe Ralph was involved in stolen securities transactions is set forth in Paragraph 15.

in the orders of September 26 and October 28.[16/] The fact that Principie was not fully identified until the September 26 order, when he might have been fully named in the September 11 order, is hardly a circumstance requiring suppression of any of his intercepted conversations. Whether fully identified or not, the order of July 5 and all subsequent orders expressly authorized the interception of his conversations.

Appellant Principie does not claim that the interceptions prior to execution of the order in which he believes he should have been fully identified were improper. Nor does he attempt to explain how his privacy interests would have been enhanced by fully identifying him in an earlier order. Indeed, the same privacy right would attach at either time--Principie's innocent conversations were subject to minimization. 18 U.S.C. 2518(5); N.Y. Crim. Pro. Law 700.30(7).

16/ The order of July 27 extending the original order authorized the interception of conversations of Martino, Labriola, "Ralph" and their confederates. The three men are mentioned throughout the application and one intercepted conversation between "Ralph" and another party in regard to stolen securities is set forth in the application (Affidavit of Assistant District Attorney Clayman, dated July 25, Paragraph 2). The extension order of September 11 likewise expressly authorized the interception of "Ralph's" conversations. The application included reference to a conversation between Labriola and "Ralph" regarding their anticipated profit margin on a stolen securities deal with one "John" [Affidavit of Assistant District Attorney Clayman, dated September 11, Paragraph 3(g)]. The order of September 26 fully identified appellant Ralph Principie. During the operative period of the previous order, appellants Principie and Labriola had, as the application in the September 26 order reveals, changed their base of operations to the Say Hi Lounge in Brooklyn. The September 26 order and the October 28 extension order authorized the interception of the conversations of Principie, Labriola and their confederates over the telephone at this new location.

The naming of Principie in two of the extention orders demonstrates that the failure of the government to identify him at an earlier time was not a subterfuge to escape any duties imposed by statute. See, n. 12 , supra. Rather, if any a responsibility to amend an application to include the names of previously unknown conspirators can be read into the statute, the inclusion of Principie in the September 26 order met this responsibility.

A similar factual situation was present in People v. Sher, 329 N.Y.S. 2d 2 (1972); as here, that court was faced with the situation where an amendment was eventually obtained to include the names of conspirators who were previously listed as unknown. The Sher court found the subsequent identification of the previously unnamed persons served to validate the interception of their conversations pursuant to the prior authorizations. Id. at 10-11. As this Court noted in United States v. Capra, supra, 501 F.2d at 276, n. 7, according retroactive effect to an amendment naming persons previously unknown does not compromise the privacy interests of such conspirators because their conversations regarding the illegal activities could have validly been intercepted under the original authorization. Those privacy interests are protected by minimized interception of communications not pertinent to the criminal enterprise. The reasoning is even more forceful here, where appellant was at least identified partially at all times. Thus, the defect, if any, in the identification requirement with regard to the September 11 order was cured when appellant Principie was fully identified in the September 26 order.

II

CONVERSATIONS INTERCEPTED PURSUANT TO THE JULY 5 ORDER WERE RELATED TO THE CRIMINAL ACTIVITY DESIGNATED IN THE ORDER

Appellant Labriola contends that certain of his conversations intercepted pursuant to the order of July 5 were unrelated to the criminal activity designated in the order and should therefore have been suppressed (Br. No. 75-1175 at 9-14). This factual assertion is without merit. An order authorizing electronic surveillance must contain "a particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates."[18 U.S.C. 2518(4)(c); N.Y. Crim. Pro. Law §700.30(4)]. The intercept order of July 5 complied with the statutory mandates; on its face it both described the type of communications sought to be intercepted (conversations concerning "the procurement and disposition of stolen securities"),[17] and designated the offenses to which the communications would relate ("grand larceny", "criminal possession of stolen property", and "conspiracy to commit said crimes").[18] Such designations are sufficient to

17/ In describing the particular type of communication sought to be intercepted, Justice Vetrano incorporated by reference this description contained in paragraph 23 of Assistant District Attorney Newman's supporting affidavit.

18/ Of course, the application also established, as the issuing court found, probable cause to believe that evidence of these crimes would be discovered by intercepting pertinent conversations over the target telephone line (See Order of July 5 and Supporting Application.

meet the requirement of particularity, thereby defining the types of conversations for which interception is authorized.[19/]

Appellant Labriola would have this Court draw the parameters more narrowly, and fails to recognize that "[t]he order must be broad enough to allow interception of any statements concerning a specific pattern of crime." United States v. Tortorello, 480 F.2d 764, 780 (2nd Cir. 1973), cert. denied, 414 U.S. 866 (1973). The two conversations which appellant argues do not come within the ambit of the July 5 order were related to "stolen securities." [Brief, No. 75-1175, pp. 9-10; July 3 Affidavit, paragraphs 2(b) & 2(c)]. Appellant Labriola contends, however, that because the conversations did not relate to securities already stolen, and thus expressly referred to in the application, they were not covered by the order. The order, however, clearly extended to the "procurement" of stolen securities and thus encompassed the evidently on-going enterprise of obtaining and distributing stolen securities. It is thus clear that the conversations intercepted related to crimes which were a part of the "specific pattern "of

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19/ See, e.g., United States v. Ripka, 349 F. Supp. 539, 542 (E.D. Pa. 1972), aff'd, 480 F.2d 918 (3rd Cir. 1973), cert. denied, sub nom., Manuszak v. United States, 414 U.S. 979 (1973) ("communications relating to offenses of bookmaking and conspiracy"); and United States v. Mainello, 345 F. Supp. 863, 872 (E.D. N.Y. 1972) (gambling offenses as enumerated by 18 U.S.C. 1955 and McKinney's C.P.L. §225.00, et. seq.).

crimes relating to the "procurement and distribution of stolen securities."

Moreover, to argue that such conversations were not within the scope of the original order, hence requiring amendment of the order "as soon as practicable" [N.Y. Crim. Pro. Law §700.65(4)][20], is contrary to the legislative intent. As the New York Committee on Revision noted, §700.65(4) encompasses only the situation where the incriminating conversation "is totally unrelated to the crime for which the warrant was issued." (emphasis added) McKinney's 1968 Session Laws of N.Y., Memorandum, p. 2293, 2296, as quoted in People v. DiStefano, 356 N.Y.S.2d 316, 320 (1974).[21] The intercepted conversations were unquestionable within the scope of the order and were therefore properly intercepted.[22]

20/ Cf. 18 U.S.C. 2517(5).

21/ Labriola's reliance on DiStefano, supra, further belies the validity of his contention. There the court did encounter incriminating conversations which were "totally unrelated" to the authorized investigation. We note that when evidence of forgery and possession of dangerous drugs was subsequently obtained during the interceptions, the renewal orders of September 11 and October 28 were amended to designate these offenses.

22/ At all events, even if the interceptions had revealed evidence of a wholly unrelated offense, the disclosure of such evidence in the renewal application, as here, would satisfy the New York statute. United States v. Tortorello, supra, 480 F.2d at 783; People v. Sher, supra, 329 N.Y.S.2d at 8-9.

III

THERE WAS PROBABLE CAUSE TO NAME APPELLANT LABRIOLA AS A TARGET OF THE INTERCEPTION IN THE JULY 27 ORDER AUTHORIZING THE ELECTRONIC INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS

On July 27, 1972, Justice Vetrano signed an order renewing and amending the order of July 5, 1972. In this amended order, appellant Labriola was for the first time specifically named as a target of electronic monitoring. Appellant Labriola contends that the application in support of that order did not establish probable cause to identify him as an interception target (Br. No. 75-1175 at 15-20).

When subjected to a common-sense reading in its entirety [United States v. Ventresca, 380 U.S. 102, 108 (1965)], the affidavit supporting the July 27 order contains a set of facts upon which the issuing court could properly find probable cause to name Labriola as an interception target.[23] Moreover, in evaluating the evidence presented in the supporting affidavit, Justice Ventrano was entitled to draw appropriate inferences as to Labriola's complicity in the conspiracy to deal in stolen securities. See, e.g., Mainello v. United States, supra., 345 F. Supp. 868.

Acting pursuant to tne July 5 order, the monitoring officers intercepted the following telephone conversation, which was subsequently set forth in support of the July 27 order:

23/ Appellant Labriola does not challenge the court's determination that there was probable cause to believe a particular offense was being committed; that conversations pertinent to that offense would be obtained through electronic monitoring; and that the facilities from which the communications were to be intercepted were being used in connection with the commission of that offense. See, 18 U.S.C. §2518(3); N.Y. Crim. Pro. Law §700.15.

At 2:55 p.m. on July 21, 1972, Paulie (co-conspirator of Joe Martino, see paragraphs 23 and 24 of July 3, 1972 affidavit) made the following outgoing call.[24]/

Paulie (In)	I'll meet you 9 o'clock at Coney Island and "L & M"
Leon (Out)	Hah hah
In	The luncheoneete
Out	Yeah yeah what's new otherwise
In	Oh nothing
Out	Did you get what you were suppose to get?
In	We're getting them. He's got them, and we're getting them tonight, so eh remember that thing that you needed that little stamp, do you still have it?
Out	Eh come again
In	Do you know the thing you needed the last time the stamp
Out	I needed
In	Yeah remember the last batch a long time ago
Out	Oh yeah yes yes yes yes yes
In	Do you still have that stamp
Out	Eh'yes I have it right here
In	Oh good because that's what we need
Out	That one with the eh
In	Yeah
Out	Wait wait a minute, wait a minute, I have the one with the date
In	That's the one we need
Out	What about the other one

24/ As subsequent events showed, "Paul" was not Martino, as suspected initially, but rather appellant Paul Labriola.

In That one we needed the last time, we need again because they've the same thing

(Affidavit of Assistant District Attorney Charles Clayman [hereinafter, July 27 Affidavit], Paragraph 2(b); App. Appendix, No. 75-1175, pp. 54-55).

Detective Thomas Huller supplied meaning to the conversation, stating that the parties were discussing the acquisition of a stamp which could be used to validate the stolen bonds and securities which "Paulie" apparently had in his possession (July 27 Affidavit, paragraph 2(b); App. Appendix, No. 75-1175, p. 55). Somewhat disingeneously, appellant Labriola argues that it would strain the imagination to read criminal import into the above conversation (Brief, No. 75-1175, p. 18). It is, however, well recognized that conspirators frequently resort to the "use of code words and cover-up jargon" which "make investigation most difficult." United States v. Manfredi, 488 F.2d 588, 599 (2nd Cir. 1973), cert. denied, 417 U.S. 936 (1974). See also, United States v. Capra, supra, 501 F.2d 273. As such, Justice Ventrano was entitled to draw upon Detective Huller's familiarity with the vernacular of the securities trade to supply meaning to this cryptic conversation. Cf., United States v. Cirillo, 499 F.2d 872, 881 (2nd Cir. 1974), cert. denied, 419 U.S. 1056 (1974); United States v. Borrone-Iglar, 468 F.2d 419 (2nd Cir. 1972), cert. denied, sub nom., Gernie v. United States, 410 U.S. 927 (1973).[25/]

25/ Both Cirillo, supra, and Borrone-Iglar, supra, dealt with the introduction of testimony at trial to explain to the jury the jargon employed in various criminal enterprises. (CON'T)

Although paragraph 2(b) of the affidavit contains no allegation that "Paulie" is, in fact, appellant Labriola, the affidavit contains a sufficient factual basis from which this may be inferred. On the evening of July 21, 1972, surveilling officers observed Labriola drive to the Coney Island "L & M" for the meeting with "Leon" which had been arranged earlier in the day in the telephone conversation (July 27 Affidavit, paragraph 5; App. Appendix, No. 75-1175, p. 58). Later that same night, another telephone conversation was intercepted, this time between "Paulie" and "Joe":

> Joe — When you send the other thing put in an envelope but put tissue around it
>
> Paul — I got the blank but I don't know if the other guy is around to type it up
>
> Joe — Send it airmail special delivery. Send it to 106-20 Sepulveda Blvd. That's my name your using Joe Antonakas. I ran into something out here, I think I got something real big in the broke. It's worth about 200 big ones. I'll see you next week. Who do you have to wait for? Leon.
>
> Paulie — Yeah he has to do the typing I met Leon tonight
>
> (July 27 Affidavit, paragraph 2(c); App. Appendix, No. 75-1175, pp. 55-56).

In this conversation (which, according to Detective Huller, referred to the shipment of $200,000 of bonds stolen from a brokerage house), "Paulie" alludes to the meeting which he had with "Leon" earlier in the night. Based on the officers'

25/ (CONT'D) A fortiori, such evidence is cognizable by a court in making a determination of probable cause.

observations of Labriola at the meeting on July 21, it was reasonable to infer that Labriola was a party to the post-meeting conversation. As such, the supporting affidavit presented a sufficient factual basis to establish probable cause for naming appellant Labriola as a target in the July 27 order.

IV

THE COURT BELOW PROPERLY SUPPRESSED ONLY THOSE ORAL COMMUNICATIONS WHICH WERE INTERCEPTED IN CONTRAVENTION OF THE JULY 27 ORDER [No.75-1175]

In signing the July 27 extention of the monitoring order, Justice Vetrano authorized the interception of oral communications occurring at the 1234 Club as well as the continuation of the previous wire intercepts. Pursuant to the order, no oral interceptions were to be made later than 7:30 p.m. on any day.[26/] Between August 9-30, the state officers intercepted oral communications at the club without regard for this time restriction (Tr. 332-333, 334-336). Accordingly, the court below suppressed all oral communications which were intercepted in violation of the 7:30 p.m. limitation (Tr. 378). None of these improperly intercepted oral communications were used in applications for subsequent orders. See note 29 , infra. Appellants contend, however, that all communications intercepted pursuant to the July 27 order and all subsequent orders should have been suppressed (Br. No. 75-1175 at 21-26).

26/ In pertinent part, the order authorized law enforcement officers to

> intercept and record the oral communications... of Joe Martino, Paul Labriola and Ralph, [and] their co-conspirators ... as such communications occur at the above captioned premises and that such interception not occur after 7:30 p.m. or any day... (July 27 Order, p. 2).

In suppressing only those oral communications which were intercepted in violation of the July 27 order, the court properly applied the general law governing search and seizure. Moreover, 18 U.S.C. 2517(3) specifically provides that "any information" which is intercepted "by means authorized" by Title III is admissible as evidence. See also N.Y. Crim. Pro. Law 700.65(3). Clearly, it was not the legislative intent that communications validly intercepted pursuant to the order should be suppressed; rather, only those communications which were improperly intercepted are subject to suppression. See, United States v. Cox, 462 F.2d 1293, 1301-1302 (2nd Cir. 1972), cert. denied, 417 U.S. 918 (1974); United States v. Sisca, 361 F. Supp. 735, 746-748 (S.D. N.Y. 1973), aff'd, 503 F.2d 1337, 1346-1349 (2nd Cir. 1974), cert. denied, 419 U.S. 1008 (1974);[27] United States v. LaGorga, 336 F. Supp. 190, 197 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523, 544-545 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974).[28] These cases deal with the subject of minimization and the rationale which supports the admissibility of properly intercepted communications applies even more forcefully here, where there was no failure to minimize in the constitutional sense.

27/ In Sisca, this Court declined to reach the question whether the appropriate remedy for a failure to adequately minimize in the suppression of all intercepted conversations and evidence derived therefrom. This Court concluded instead that the defendant's failure to make a timely motion to suppress constituted a waiver of that claim.

28/ Unlike the situation in United States v. Focarile, 340 F.Supp. 1033, 1046-1047 (D. Md. 1972), an "item-by-item" suppression of unauthorized interceptions would not prove illusory in the instant case. Rather than merely suppressing those communications which (CON'T)

Moreover, appellants Labriola and Slomka make no showing "that a substantial portion of the case against [them] was a fruit of the poisonous tree." Alderman v. United States, 394 U.S. 165, 183 (1969), quoting Nardone v. United States, 308 U.S. 338, 341 (1939).[29] Indeed, it is apparent that appellants' convictions were not based upon either the improperly intercepted oral communications (which were suppressed) or an "exploitation" of these communications. See, Wong Sun v. United States, 371 U.S. 471, 488 (1963). Evidence of recordings which were intercepted under the terms of the surveillance orders were introduced against each appellant. In addition, defense counsel stipulated that, if called, an agent would testify that Labriola had confessed to his participation in the conspiracy to procure and distribute stolen bonds (Tr. 390). Defense counsel also stipulated that the fingerprints of both Labriola and Slomka were found on some of the stolen bonds and that the endorsements on certain stolen bonds appeared to be in Slomka's handwriting (Tr. 388-390). Finally, a tape recording was introduced of a conversation between Slomka and an informer in which

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28/ (CONT'D) CONT'D) were innocent, the suppression order required the suppression of all conversations intercepted after the 7:30 termination time. By denying the government the use of incriminating conversations intercepted after 7:30 p.m., the court's order provided a meaningful prophylactic to deter unauthorized governmental conduct.

29/ In their argument on this point, appellants allude to two incriminating conversations which were monitored by oral interception (Brief, No. 75-1175, p. 22). The August 15 conversation, which was intercepted after 7:30 p.m., was not used to support an application for continued surveillance, nor was it introduced as evidence at trial. As stipulated by defense counsel at trial, the August 11 conversation, which was used to support the application for the September 11 order (September 11 Affidavit, p. 10), was intercepted at 3:50 p.m. (Tr. 339-340, 348). It was therefore, well within the ambit of the July 27 order.

she discussed her participation in the conspiracy (Tr. 391). Under such circumstances, it is clear that the evidence introduced at trial was independent of the improper monitoring . See e.g., United States v. Sisca, supra , 361 F. Supp. at 747.

V

THE FAILURE OF THE GOVERNMENT TO CAUSE A POST-TERMINATION NOTICE OF INTERCEPTION TO BE SERVED ON APPELLANTS DID NOT RESULT IN ANY PREJUDICE, AND, THUS, SUPPRESSION IS NOT REQUIRED (NOS. 75-1175 and 75-1176).

18 U.S.C. 2518(8)(d) and N.Y. Crim. Pro. Law. §700.50(3) provide that written notice shall be served upon the persons named in the order or application within ninety days following the termination of an order or an extension order.[30/] These provisions also provide that notice may be served on parties to the intercepted conversations who are not named in the order at the discretion of the judge. Each appellant contends that all their intercepted conversations should have been suppressed because these provisions were not complied with (Br. No. 75-1175 at 27-29; Br. No. 75-1176 at 9-13).

The initial order of July 5 authorized the interception of telephonic communications from a target telephone located in the 1234 Club. The order to monitor this target telephone was extended on July 27 and September 11. However, no interceptions were made on this telephone after September 1, because the conspirators had moved their operation to a new location. On September 26 and on October 28, extention orders were also

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30/ The written notice must include the fact of entry of an order, the date of issuance, the period of authorized monitoring and the fact that communications were or were not intercepted. The federal statute requies notice of the fact that an application was denied.

authozied, although they were amended to monitor the telephone at the "Say Hi" Lounge. Both appellants Labriola and Principie were named targets in these extentions. Slomka was never named in an order. The final extension terminated on November 26. Notice was served on appellant Labriola on December 13, 1972 (Stipulation, Tr. 328). Appellants Principie and Slomka never received written notice and did not receive actual notice until November 8, 1973 (Tr.377 ; App.A-42).

1. There is no merit to appellant Labriola's contention that he did not receive notice within the statutorily prescribed period.

The district court concluded that appellant Labriola should have received notice of the interception at the 1234 Club within 90 days of the last interception at that location, which he calculated to have occurred on September 1, 1972. This construction is contrary to the plain language of the statutes which expressly provide that notice is to be served within 90 days of the termination of the order or an extension thereof, 18 U.S.C. 2518(8)(d); N.Y. Crim. Proc. Law §700.50(3). The last order designating the premises of and telephone line subscribed to by the 1234 club was dated September 11, 1972. It was operative until October 9. Appellant received notice 66 days later, on December 13, well within the statutorily specified period. Had Congress or the New York legislature intended the time to run from the day of the actual last intercepted conversation (here, September 1), it undoubtedly would have so provided. Cf. United States v. Kahn, 415 U.S. at 152-153.

Moreover, the construction adopted by the court below would require notice of interception at one location while interception pursuant to the same investigation was ongoing at another location. It is clear that Congress intended no such anomolous result:

> Where interception is discontinued at one location, when the subject moves, but is reestablished at the subject's new location, or the investigation itself is still in progress, even though interception is terminated at any one place, the inventory due at the first location could be postponed until the investigation is complete.... 2 U.S. Code Cong. & Adm. News 2194 (1968).

Labriola was still the target of an interception order until the October 28 order expired on November 26. Within three weeks of that date he received notice. It seems evident that service of notice within a reasonable period of time after expiration of the final intercept order is consistent with the statutory requirement. Indeed, in our view, the October 28 order is properly regarded as the final extension of the original July 5 order and thus service of notice within ninety days of the expiration of the October 28 order should satisfy the statutory requirements.

2. With regard to appellants Principie and Slomka, the district court correctly concluded that in the absence of a demonstration of prejudice, the failure to serve them with written notice within the statutorily prescribed period did not warrant suppression of their intercepted communications (Tr. 377 ; App. A-42).

The purpose of the post-termination notice provision is to prevent the secret use of electronic surveillance. In such a way the subject of the surveillance will "eventually" become aware of the interceptions and be able to pursue civil redress under 18 U.S.C. 2520 if he believes his rights have been violated. 2 U.S. Code Cong. & Adm. News 2194 (1968). It is clear that Congress intended the post-termination provision to be flexible, for it specifically provided that the government, upon a showing of good cause, could have service of the inventory delayed, in some cases almost indefinitely. See, 2 U.S. Code Cong. & Adm. News 2194.

As such, it is highly questionable whether Congress even contemplated suppression as a remedy for failure to serve notice within the statutory period.[31/] As the Supreme Court recently observed in regard to the suppression provision of Title III:

> Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures.

United States v. Giordano, 416 U.S. 505, 527 (1974). Clearly not "every failure to comply with any requirements provided in Title III [will] render the interception of wire or oral communications 'unlawful.'" United States v.Chavez,

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31/ Suppression is controlled by the provisions of 18 U.S.C. 2518(10)(a). Failure to serve inventory notice obviously could not give rise to suppression as a facial defect in the order [18 U.S.C. 2518(10)(a)(ii)] or as an interception not made in accordance with the order [18 U.S.C. 2518(10)(a)(iii)]. If suppression is a proper remedy it can only result from an extrapulation of the language "communication unlawfully intercepted" [18 U.S.C. 2518(10)(a)(i)] to include events subsequent to the completion of the interception.

416 U.S. 562, 574-575 (1974).

Any conclusion that the inventory notice provisions were intended to play a "central role" in "limiting the use of intercept procedures" seems unwarranted. It is anomulous to deem an interception pursuant to a valid order to be void ab initio merely because of the operation of a condition subsequent. See, United States v. Cafero, 473 F.2d 489, 499 (3rd Cir. 1973), cert. denied, 417 U.S. 918 (1974); United States v. Donovan, 513 F.2d 337, 345-346 (6th Cir. 1975) (Engle, J., dissenting). Even assuming that there are circumstances when a failure to comply with the post-termination notice requirement may properly result in suppression, such circumstances can arise only when actual prejudice is demonstrated. United States v. Rizzo, 492 F.2d 443, 447 (2nd Cir. 1974), cert. denied, 417 U.S. 994 (1974); United States v. Manfredi, 488 F.2d 588, 601-602 (2nd Cir. 1973), cert. denied, 417 U.S. 936 (1974); United States v. Iannelli, 477 F.2d 999, 1003 (3rd Cir. 1973) aff'd on other grounds 95 S. Ct. 1284 (1975); United States v. Bohn, 508 F.2d 1145, 1148 (8th Cir. 1975); United States v. Chun, 503 F.2d 533, 542 (9th Cir. 1974). Contra, United States v. Donovan, supra.[32/]

Appellants allege no such prejudice, nor would the record support such an allegation. Each appellant received actual notice from law enforcement officers. As such the congressional intent was satisfied in that the fact of interception was disclosed

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32/ The government intends to file a petition for a writ of certiorari in Donovan. The question presented there is whether the government has a duty under 18 U.S.C. 2518(8)(d) to advise the court of all persons who have been subject to wire interception so that the Court may exercise its discretionary authority to serve them with a notice of interception.

and the subjects of the surveillance could pursue civil redress for any improper invasion of privacy. Moreover, actual notice was received more than one year prior to the suppression hearing below. See, United States v. Rizzo, supra; United States v. Iannelli, supra.[33] As such, the circumstances of this case do not warrant suppression for failure to comply with the

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33/ Similarly, appellants to not maintain that the government chose deliberate non-compliance in an attempt to gain some sort of tactical advantage. Rather, the record discloses that the failure was inadvertent, due to the operation of the federal system. The interceptions were authorized by a state justice; when the state indictments were returned, only those defendants (including Labriola) were served with notices. Subsequently on November 8, 1973, when federal indictments were returned, the other appellants, who had not been indicted on state charges, received notice (Tr. 182-183). Such a lack of bad faith on the part of the government also militates against suppression. United States v. Chun, supra, 503 F.2d at 542; United States v. Wolk, 466 F.2d 1143, 1145 (8th Cir. 1972).

literal requirements of the notice inventory provisions.[34/]

34/ Appellant Principie argues that state law requires suppression (Brief, No. 75-1176, pp. 10-12). However, a federal court is not so bound when the state decisions are not "dispositive or particularly indicative of how the New York courts would rule on the facts before us". United States v. Manfredi, supra, 488 F.2d at 599.

Although suppression was required by the court in People v. Tartt, 336 N.Y.S.2d 919, 924-925 (1972), the court did so by exercising a reliance upon the holding in United States v. Eastman, 465 F.2d 1057 (3rd Cir. 1972) which was unwarranted in light of a subsequent Third Circuit clarification of Eastman, See, United States v. Cafero, supra, 473 F.2d at 499. Arguably, that court might reach a different conclusion in the wake of Cafero. By contrast, the court in People v. DiLorenzo, 330 N.Y.S.2d 720, 728 (1971), required a demonstration of prejudice before a failure to give a time post-termination notice would result in suppression. The court in People v. Hueston, 34 N.Y.2d 116, 120-122 (1974), evolved the "special circumstances" approach, considering whether the accused received actual notice, whether the actual notice was received within the statutory period, and whether the policy considerations behind the notice requirement were met. Suppression was not required on the facts presented in Hueston where there was actual notice within the ninety day period. The instant facts of a non-prejudicial failure to give a formal notice where actual notice was received (albeit, not within the statutory period) and the policy considerations underlying the statute were met was not before the court in Hueston.

In both United States v. Rizzo, supra, and United States v. Manfredi, supra, this Court has construed both the federal and the New York statutes to require a showing of actual prejudice before suppression would be required.

CONCLUSION

It is therefore respectfully submitted that appellants' convictions should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 1975, copies of the Brief of the Appellee, United States of America, were mailed to counsel for appellants by air mail and special delivery, at the following addresses:

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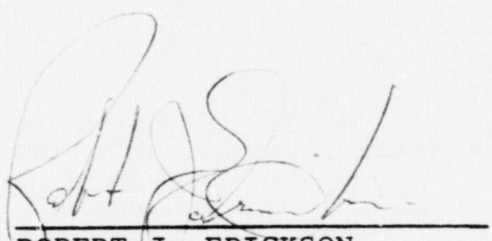

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DOJ-1975-08